Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	**CG Docket No. 02-278**
	)	**CC Docket No. 92-90**
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	

REPLY COMMENTS AND RECOMMENDATIONS OF THE ATTORNEY GENERAL OF INDIANA

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INTRODUCTORY STATEMENT

As Attorney General for the State of Indiana, I respectfully submit these comments in connection with the Federal Communication Commission's review of the rules it adopted in 1992 implementing the Telephone Consumer Protection Act of 1991 (TCPA). Though I joined the Comments and Recommendations of the Attorneys General filed on December 9, 2002, additional comments are necessary to reply to comments of various participants in the telecommunications industry proposing that the FCC preempt state laws concerning telephone privacy.

Indiana has one of the most comprehensive and effective telephone privacy, or do-not-call ("DNC") laws in the nation. *See* Ind. Code § 24-4.7 *et seq.* This law protects over 53% of residential phone numbers from unwanted telemarketing calls, and it has achieved a very high level of success. According to a scientific survey commissioned by my office after our law became enforceable, for people on the telephone privacy list, telemarketing calls on average declined from 12.1 per week to 1.9 per week following enforcement, a decline of over 80%. Further, 97.8% of Hoosiers on the list surveyed reported that they receive "less" or "much less" telemarketing calls since the law became enforceable, with 86.6% of them reporting "much less."

In light of the extraordinary success of Indiana's DNC law, Indiana citizens have a very strong interest in ensuring that no similar federal rule will preempt the Indiana law in any way. And while telecommunications businesses may wish for the FCC to promulgate a less comprehensive rule that preempts state laws so that they can telephone more people more often, their arguments for preemption have no basis in the law. Therefore, it is my recommendation, as supported by the arguments set forth below, that the FCC expressly declare that none of its

regulations shall preempt any state's DNC laws. The TCPA and implementing regulations should merely establish a floor for the regulation of unwanted telemarketing calls, not a ceiling.

Federal Statutes Do Not Preempt States From Enforcing Their Own Telephone Privacy Laws Against Interstate Calls And Do Not Grant The FCC The Power To Cause Such Preemption.

Several comments from the telecommunications industry contend that one or more federal statutes either already preempt the application of state telephone privacy acts to interstate telephone sales calls or at least authorize the FCC to undertake such preemption through its own telephone privacy regulation.[1] In particular, they argue that the Federal Communications Act of 1934 (FCA) preempts state regulation of interstate telephone calls by occupying the field of interstate telephone call regulation, and they argue that TCPA either preempts state telephone privacy law as applied to interstate calls on its own or supplies the FCC with the power to preempt such regulations. These arguments are without foundation, and indeed are contrary to the text of both the FCA and the TCPA.

I. The Federal Communications Act Of 1934 Does Not Preempt All State Laws That Happen To Impact Interstate Telephone Calls.

In their comments concerning the FCC's proposed DNC registry, businesses that engage in telemarketing argue that the FCA somehow already preempts states from applying their own DNC laws to interstate telephone solicitations. (*See* Intuit Reply Comments at 3, WorldCom

[1] *See, e.g.*, Reply Comments of Intuit Inc., filed with the FCC, dated January 31, 2003, at 2-5. (hereinafter "Intuit Reply Comments at ___"); Reply Comments of WorldCom, Inc., filed with the FCC, dated January 31, 2003, at 27-29. (hereinafter "WorldCom Reply Comments at ___"); Reply Comments and Recommendations of Direct Marketing Association, filed with the FCC, dated January 31, 2003, at 4-8. (hereinafter "DMA Reply Comments at ___"); Reply Comments of the American Teleservices Association, filed with the FCC, dated January 31, 2003, at 55-56. (hereinafter "ATA Reply Comments at ___"); Reply Comments of Visa, filed with the FCC, dated January 31, 2003, at 7-9. (hereinafter "Visa Reply Comments at ___"); Reply Comments of Verizon, filed with the FCC, dated January 31, 2003, at 6. (hereinafter "Verizon Reply Comments at ___").

Reply Comments at 27.) However, the authority these comments rely on for this proposition is notably thin, and indeed there is no basis for concluding that the FCA preempts all state laws from applying to interstate telephone calls.

A. Intuit and WorldCom's Authorities Do Not Hold That The FCA Preempts All State Regulations That Affect Interstate Calls Or Telecommunications Services.

The only authority that Intuit and WorldCom cite in support of their FCA preemption theory are the following cases: *National Ass'n of Regulatory Util. Comm'rs v FCC*, 746 F.2d 1492, 1498, 1499 (D.C. Cir. 1984) ("*NARUC")*; *North Carolina Utils. Comm'n v. FCC*, 537 F.2d 787, 791-94 (4th Cir. 1976) ("*NCUC*"); *Ivy Broadcasting Co. v. AT&T*, 391 F.2d 486, 491 (2d Cir. 1968). None of these cases, however, stands for the proposition that the FCA preempts all state laws from applying to interstate telephone calls. At most, they stand for the unremarkable proposition that the FCC, and not states, may regulate the *provision* of telephone services that cross state lines, including the physical facilities used to provide those interstate services.

In *NARUC*, for example, the court upheld the FCC's regulation of WATS facilities that were used as part of an interstate network, even though the facility itself was intrastate. 746 F.2d at 1499. The court ruled that "purely intrastate *facilities and services* used to complete even a single interstate call may become subject to FCC regulation to the extent of their interstate use." *Id.* at 1498 (emphasis added). It stressed that "[t]he Communications Act thus explicitly creates FCC jurisdiction over all 'facilities' and 'services' used at any point in completing an interstate telephone call." *Id.* at 1499. The focus of the case was on who could regulate the *facility* and *service* of a WATS network, not on who could protect consumers' residential privacy from

unwanted interstate calls. DNC laws do not regulate facilities and services; they regulate unwanted calls.

Similarly, *NCUC* merely ruled that only the FCC, and not a state regulatory body, could regulate "the interconnection of customer-provided equipment to the customer's individual subscriber station and line . . . ." 537 F.2d at 790. As in *NARUC*, the only type of regulation at stake had to do with communications facilities and interconnections—the physical means for providing interstate calls. And the *NCUC* court was plainly concerned only with the FCC's "plenary jurisdiction over the rendition of interstate and foreign communications services that the Act has conferred upon it." *Id*. at 793. Again, DNC laws have nothing to with the "rendition" of interstate telephone service. They have to do only with stopping unwanted calls, no matter where they originate.

Ivy Broadcasting merely ruled that putative state law claims for negligence and breach of contract in the provision of interstate telephone service actually stated federal common law claims that preempted the state claims. 391 F.2d at 490, 491. The court stated its holding very narrowly: "questions concerning the duties, charges, and liabilities of telegraph or telephone companies with respect to interstate communications service are to be governed solely by federal law . . . ." 391 F.2d at 491. In fact, in light of *AT&T Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 224-25 (1998) (holding that state claims addressing services addressed in tariffs are preempted under the filed-rate doctrine), *Ivy Broadcasting* is best understood as a filed-rate doctrine case. And in the current de-tariffed regulatory environment, the FCA's preemption of state law claims by virtue of the filed-rated doctrine ceases to exist. In the process of ordering de-tariffing, the FCC (in its *Order on Reconsideration*, 12 FCC Rcd at 15,057 (¶ 77)), stated that "the Communications Act does not govern other issues, such as contract formation and breach of

contract, that arise in a de-tariffing environment. . . . [C]onsumers may have remedies under state consumer protection laws as to issues regarding the legal relationship between the carrier and customer in a de-tariffed regime." *Policy and Rules Concerning the Interstate, Interchange Marketplace,* CC Docket No. 96-61, Order on Reconsideration, 12 FCC Rcd 15,014, 15,057 (¶ 77) (1997). Thus, *Ivy Broadcasting* provides no instructive value,[2] and the FCC's own comments with respect to state law in light of de-tariffing undermine any argument that the FCA preempts all state laws that may affect interstate calls or telecommunication services. *See also In the Matter of Petitions of Sprint PCS and AT&T Corp.,* FCC 02-203, n.39, 2002 WL 1438578 (FCC July 3, 2002).

Moreover, even to the extent *Ivy Broadcasting* found complete preemption based on federal common law, that position has now been rejected by the Second Circuit itself. In *Marcus v. AT&T Corp.*, 138 F.3d 46, 54 (2d Cir. 1998), the court, though it ruled several state law claims preempted under the now-unnecessary filed-rate doctrine, also ruled that "we believe that federal common law does not completely preempt state law claims in the area of interstate telecommunications." Other courts have also ignored or rejected *Ivy Broadcasting* because it did not account for the savings clause provided in 47 U.S.C. § 414.[3] Even before de-tariffing, this

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[2] In any event, citation to filed-rate doctrine cases are inapposite because DNC laws merely protect residential privacy from unwanted calls and have nothing to do with tariffs, charges or the "duties charges and liabilities" of anyone "with respect to interstate communications service." *Cf. Cooperative Communications, Inc. v. AT&T Corp.*, 867 F. Supp. 1511, 1517 (D. Utah 1994) ("CCI's state law causes of action . . . do not involve the *provision* of telecommunications services. *** CCI's claims do not implicate the standards of uniform and equal service that *Ivy* and its progeny sought to protect under federal common law."). To be sure, de-tariffing has further negated any instructive value filed-rate cases may have had concerning preemption in this context.

[3] Section 414 provides that "[n]othing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

part of the FCA had been held to preserve those state law claims that were not preempted by the filed-rate doctrine and that did not conflict with claims created under the Act. *See, e.g., Cellular Dynamics, Inc. v. MCI Telecommunications Corp.*, 1995 WL 221758, *3 (N.D. Ill.) (stating that "[c]ourts to address this issue since *Ivy* have generally held that Congress' decision to include a savings clause in the Act evidences its desire to preserve those state court claims for breaches of independent duties that neither conflict with specific provisions of the Act, nor interfere with its regulatory scheme," and collecting cases); *Cooperative Communications, Inc.*, 867 F. Supp. at 1516 (holding that section 414 preserves "state law causes of action, such as interference with contract or unfair competition"). De-tariffing has removed any argument concerning complete preemption by the FCA. *See, e.g., Wisconsin v. AT&T Corp.*, 217 F. Supp. 2d 935, 938 (W.D. Wis. 2002) (remanding Attorney General's consumer protection claim against telecommunications provider to state court because "with the demise of filed tariffs . . . complete preemption clearly no longer exists. *** [T]here is not complete preemption by the FCA which would warrant the exercise of federal question jurisdiction").[4]

Thus, neither *Ivy Broadcasting* nor any of Intuit and WorldCom's other authorities stand for the proposition that the FCA preempts all state law claims that may affect interstate calls or telecommunications.

[4] At least two circuits appear to be in conflict over whether the FCA preempts a state law unconscionability challenge to an arbitration clause in a telecommunications services agreement. Contrast *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003) (concluding that such preemption does not exist) with *Boomer v. AT&T Corp.*, 309 F.3d 404 (7th Cir. 2002) (concluding that such preemption exists). But any such preemption is conflict preemption and has no bearing here. Indeed, the Seventh Circuit in *Boomer* acknowledged that "under the new de-tariffed regime federal law no longer completely preempts state law." *Boomer*, 309 F.3d at 424. Thus, there is no complete preemption even for purposes of law affecting the terms and conditions of telecommunications services, which, again, is a species of law wholly distinct from DNC laws. DNC laws are even less subject to field preemption arguments because they do not affect the provision of telecommunications service.

B. The FCA Permits State Laws That Impact Interstate Calls Or Telecommunications Services.

It is also clear that such independent state laws may affect *interstate* calls or telecommunication services and still not be preempted. *See In Re Universal Service Fund Telephone Billing Practice Litigation*, 247 F. Supp. 2d 1215, 1221, 1226 (D. Kan. 2002) (holding that the FCA did not completely preempt state fraud claims where companies misrepresented the amount of Universal Service Fund charges, which are based on interstate calls, that they would pass on to the government; some misrepresentations were allegedly made over the Internet and a 1-800 number); *see also Minnesota v. WorldCom, Inc.*, 125 F. Supp. 2d 365, 372 (D. Minn. 2000) (permitting lawsuit by state attorneys general for state-law false advertising as applied to promotion of interstate long distance services because "WorldCom has not identified any provision of the FCA demonstrating that Congress intended to regulate the advertisement of interstate long distance telephone services"); *A.S.I. Worldwide Communications Corp. v. WorldCom, Inc.*, 115 F. Supp. 2d 201, 207 (D.N.H. 2000) ("I cannot reasonably infer that Congress manifested a clear intention to occupy the entire interstate telecommunications field to the exclusion of any state regulation in that area.").

Indeed, one court has suggested that, even if a state may not increase a common carrier's regulatory burden by requiring it to report the interstate obscene calls of its customers, the state very likely could prosecute the common carrier if the carrier itself was the source of the interstate obscene calls. *Sprint Corp. v. Evans*, 818 F. Supp. 1447, 1458 (M.D. Ala. 1993). "In that situation," the court observed, "the common carrier would be acting as the information provider rather than solely as a common carrier." *Id.* That is the model of DNC laws: those who violate them are not acting as common carriers, so there is no basis for inferring FCA preemption.

C. The Rationale For The FCA Would Not Be Frustrated By State DNC Laws That Apply To Interstate Calls.

More broadly, the underlying regulatory rationale that has led courts to find FCA field preemption in some circumstances is not at stake with respect to state DNC laws. When considering whether the FCA preempts a particular state law cause of action, courts have consistently observed that the reason to be concerned with such preemption is to prevent state laws from interfering with the FCA's goal of providing a uniform, efficient telecommunication services. Even *Ivy Broadcasting* observed that the reason for its holding was that "[o]ne of the stated purposes of the Communications Act was to make available to the people of the United States a rapid, efficient, nationwide communications service with adequate facilities at reasonable prices." *Ivy Broadcasting*, 391 F.2d at 490 (citing 47 U.S.C. § 151).

This express statutory goal has consistently been the touchstone of other FCA preemption decisions, no matter the result. *See, e.g., NARUC*, 746 F.2d at 1499 ("As we have said before, Congress did not intend to allow 'inconsistent state regulations [to] frustrate [its] goal of developing a 'unified national communications service.'" (quoting *California v. FCC*, 567 F.2d 84, 86 (D.C. Cir. 1977)); *NCUC*, 537 F.2d at 791 (citing 47 U.S.C. § 151 as providing the express purpose of the Commission and thus the context for preemption analysis); *Cellular Dynamics, Inc.*, 1995 WL 221758, *3 (N.D. Ill.) ("[T]he Communications Act is primarily concerned with the quality, price, and availability of the underlying service."); *Cooperative Communications, Inc. v. AT&T Corp.*, 867 F. Supp. 1511, 1516 (D. Utah 1994) ("In enacting the Communications Act, it is manifest that Congress intended to occupy the field of telecommunications, in order to make available to all people of the United States a rapid, efficient, reasonably-priced communications service, governed by one uniform regulatory scheme."). Indeed, the Supreme Court itself has indicated that the only time for inferring field

preemption by the FCA is where section 151's goals may be thwarted. *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 370 (1986) ("To this degree, § 151 may be read as lending some support to respondents' position that state regulation *which frustrates the ability of the FCC to perform its statutory function of ensuring efficient, nationwide phone service* may be impliedly barred by the Act.") (emphasis added).

State DNC laws threaten no interference with Congress' goal of providing a rapid, efficient, reasonably priced national telecommunications service, even when applied to interstate calls, and even when applied to telecommunications carriers engaged in commercial solicitations. DNC laws merely protect residential privacy from unwanted telemarketing calls. They do not regulate the provision of telephone service, the physical facilities of telephone service, or the price of telephone service. They simply permit residential telephone subscribers to hang virtual "no solicitation" signs on their phones in order to preserve their peace. The FCA does not preempt state laws that do not regulate the provision of telephone service or interfere with the regulation of telephone service. *See Indiana Bell Telephone Co. v. Ward*, 2002 WL 32067296, *7 (S.D. Ind.) ("Because resolution of the fraud claims before the court will not affect federal regulation of telecommunications carriers, plaintiffs' claims are not preempted by the FCA."). To infer FCA preemption of state DNC laws would be like inferring that federal vehicle safety requirements preempt state negligent driving laws as applied to accidents caused by cars driven over state lines. Both types of laws address misuse of a lawful, otherwise-regulated instrument resulting in injury and cause no interference with the goals of the federal regulations. There is no basis for inferring preemption of either.

D. FCA Preemption Of State Laws That Apply To Interstate Calls Would Affect Many State Consumer Protection And Deceptive Trade Practices Laws.

Comments from participants in the telecommunications industry, and in particular WorldCom, fundamentally misunderstand the nature of state DNC laws. WorldCom says interstate telephone regulation is not a traditional area of state concern, and therefore should be afforded no deference under preemption analysis, citing *U.S. v. Locke*, 529 U.S. 89 (2000). (*See* WorldCom Reply Comments at 28.) State DNC laws, however, are not telephone service regulations; they are privacy regulations targeted at the particular disturbance occasioned by high volumes of unwanted telephone solicitations. Such consumer protection laws are most certainly within the traditional police power authority of states, even when they affect interstate calls. The injuries to state citizens are the same regardless of where a call originates, so states have an equal interest in enforcing their laws against all unwanted calls. *Cf. Ashley v. Southwestern Bell Telephone Co.*, 410 F. Supp. 1389, 1393 (W.D.Tex. 1976) ("Specifically, state tort law of invasion of privacy was not preempted by the federal law scheme, and no attempt was made to impose uniformity in this area of state law.").

Indeed, if the theory that the FCA preempts state laws as applied to interstate telephone calls were to be taken seriously, it would mean preemption not just for DNC laws as applied to interstate solicitations, but preemption of other consumer protection and deceptive trade practice laws, and even of obscene call prohibitions (see, e.g., Ind. Code § 35-45-2-2), as applied to interstate calls. States have a long-established history of enforcing their consumer protection and deceptive trade practices laws against fraudsters who call from other states. *See, e.g*., *People ex rel. Spitzer v. Telehublink Corporation*, 756 N.Y.S.2d 285 (N.Y. App. 2003) (reviewing New York state law action against a Delaware corporation that sold a discount benefits package to customers throughout the United States by telephone calls from Montreal); *Commonwealth v. Events International, Inc.*, 585 A.2d 1146, 1148, 1151 (Pa. Commw. Ct. 1991) (ordering

defendants to answer Pennsylvania Attorney General state consumer fraud action alleging that company telephoned Pennsylvania consumers from Florida to solicit fraudulent contributions).

Statistics show even more dramatically the frequency of interstate enforcement of both telephone privacy and general consumer protection laws. While DNC laws are relatively new, Indiana in particular has established a history of enforcing its DNC law against out-of-state callers. Since the inception of Indiana's DNC law on January 1, 2002, the Indiana Attorney General's office has obtained settlements with 125 telemarketers, 75% of whom were calling Indiana consumers from other states.

With respect to other laws, our Consumer Protection Division has enforced Indiana's Deceptive Consumer Sales Act (Ind. Code § 24-5-0.5) against numerous out-of-state telemarketers. Frequently, such disputes result in settlement short of lawsuit or the signing of an Assurance of Voluntary Compliance ("AVC") by the telemarketer. Since the mid-1980's the Consumer Protection Division has filed 26 lawsuits involving interstate telemarketing (inbound and outbound), resulting in 17 consent judgments and nine default judgments. Since 1983, Indiana has enforced its Professional Fundraiser Consultant and Solicitor Registration Act (Ind. Code § 23-7-8) against out-of-state telephone solicitors, resulting in approximately ten settlements.

Over a ten-year period beginning in October, 1993, the Iowa Attorney General's Consumer Protection Division filed criminal charges against 38 individuals for committing fraud via interstate telemarketing calls, resulting in 37 felony convictions and one fugitive. In the past five years, the State of North Carolina has filed 20 actions against a total of 66 defendants, reached 4 settlement agreements, and written 83 cease and desist or advisory letters, all concerning out of state telemarketers violating North Carolina law.

Just this month the Supreme Court ruled that Illinois could prosecute a charity for telemarketing fraud for overstating the amount of each donation that would go to charitable programs and services. *See Madigan v. Telemarketing Assoc., Inc.*, __ S. Ct. __, 2003 WL 2011021 (May 5, 2003). Do the telemarketing and telecommunications industries really think Illinois is prohibited from pursuing charities where the fraudulent calls happen to cross state lines? The history of state consumer protection enforcement should give them plenty of notice that states need not forebear when a call crosses a state line.

II. The TCPA Does Not Preempt State DNC Laws As Applied To Interstate Calls, And It Specifically Withholds Power From The FCC To Undertake Such Preemption.

A. One Federal Circuit And An Indiana State Court Have Already Held That The TCPA Does Not Preempt State Law.

At least two courts have already concluded that the Telephone Consumer Protection Act (TCPA) does not preempt state law. In *Steve Martin & Associates v. Carter*, No. 82C01-0201-PL-38 (Vanderburgh Circuit Court, 2002), the court held that the TCPA did not preempt Indiana's Telephone Privacy Act in any respect because "the T.C.P.A. contains an explicit non-preemption clause: the T.C.P.A. does not preempt 'any State law . . . which prohibits . . . the making of telephone solicitations.' 47 U.S.C. § 227(e)(1)." The court also ruled that the TCPA does not preempt Indiana's law by implication or manifest any intention to occupy the field of telephone solicitation. It also held that there is no conflict between the TCPA and Indiana's Telephone Privacy Act.

Furthermore, in *Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995), Minnesota enacted a statute that regulated the use of automatic telephone dialing-announcing devices (ADADs). Such devices "dial telephone numbers either according to a pattern (*e.g.*, consecutive or random numbers), or as programmed, and, when the telephone is answered, deliver a recorded

message." *Id.* at 1545. In *Van Bergen*, the court held that the TCPA did not preempt the Minnesota statute, even though that statute "is 'virtually identical' to the TCPA." *Id.* at 1548 (citing *Lysaght v. State*, 837 F. Supp. 646, 648 (D.N.J. 1993)). First, the court observed that no provision of the TCPA expressly preempted the Minnesota statute. Second, the court could not, from the language and structure of the TCPA, infer any congressional intent for the TCPA to preempt state law—the court noted that "the [TCPA] includes a preemption provision expressly *not* preempting certain state laws." *Van Bergen*, 59 F.3d at 1548. Moreover, the court determined, "[i]f Congress intended to preempt other state laws, that intent could easily have been expressed as part of the same [nonpreemption] provision." *Id.* Third, the court looked to the congressional findings appended to the TCPA, which showed that Congress intended the TCPA "not to supplant state law, but to provide interstitial law preventing evasion of state law." *Id.* Therefore, the court found "that Congress did not intend to 'occupy the field' of ADAD regulation . . . ." *Id.* (citing *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963)). Finally, the court resolved that the Minnesota statute did not actually conflict with the TCPA despite the "identical objective" of each. *Id.* The court in *Van Bergen* looked to the language and structure of the TCPA, and comparing it to the Minnesota statute, determined that the TCPA did not preempt the state law. *Id.*

The Direct Marketing Association (DMA) argues that *Van Bergen*'s holding with respect to preemption is dicta because the caller sought to make political calls that were not covered by the TCPA in any event. (*See* DMA Reply Comments at 5.) The availability of an alternative ground for a particular resolution, however, does not render a court's actual holding and reasoning dicta, even where that alternative ground is expressly stated. *See, e.g., Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 340 (1928) ("It does not make a reason given

for a conclusion in a case obiter dictum, because it is only one of two reasons for the same conclusion."); *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919, 925 n.21 (5th Cir. 1977) ("It has long been settled that all alternative rationales for a given result have precedential value."). There is even less reason to treat *Van Bergen*'s given rationale as dicta: The court did not even state the DMA's suggested alternative ground, and there is no evidence that anyone even raised it. Even if the state defendant in *Van Bergen* argued that the TCPA could not preempt in that circumstance because it did not apply to political calls, the *Van Bergen* court obviously viewed the issues of the TCPA's express, implied, conflict, and field preemption to be threshold matters. As such, the court's reasoning and resolution of those matters constitute holdings, even if some other theories leading to a similar outcome may have been available.

B. Preemption Doctrine Leads To The Conclusion That The TCPA Does Not Preempt Application Of State Laws To Interstate Calls.

Even apart from these precedents, analysis of the TCPA under federal preemption doctrine leads to two important conclusions: (A) that the TCPA does not preempt state telephone privacy laws as applied to interstate calls, and (B) that the FCC lacks authority to preempt such applications. At most, the language of the TCPA was intended to permit the FCC to establish a floor for the regulation of unwanted telemarketing calls by the industries it regulates, rather than a ceiling.

A federal statute may preempt state law in the following ways: (1) express preemption that results from express language in a Congressional enactment; (2) implied preemption resulting from an inference, based on statutory language and the depth and breadth of a congressional scheme, that Congress intended to exclude states from occupying the legislative field; (3) conflict preemption, "when federal and state law actually conflict, even when Congress says nothing about it"; and (4) field preemption, where a court determines that Congress

"intended to remove an entire area from state regulatory authority." *Garrelts v. SmithKline Beecham Corp.*, 943 F. Supp. 1023, 1033 (N.D. Iowa 1996); *see also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 540-41 (2001). In all preemption cases, particularly those in which Congress has "legislated . . . in a field which the States have traditionally occupied," courts start with the assumption that the federal act does not supersede the historic police powers of the states unless that was the clear and manifest purpose of Congress. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). "[T]he purpose of Congress is the ultimate touchstone in every pre-emption case." *Id.* (internal citation omitted).

Further, the FCC may preempt state law only where congressional authorization provides the authority for it to do so. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). "[A]n agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." *Id*. One must examine the nature and scope of the authority granted to the agency along with any limitations to that authority contained within the statute. *Id.* To survive scrutiny, an agency's choice to preempt must be a "reasonable accommodation of conflicting policies *that were committed to the agency's care* by the statute. . . ." *United States v. Shimer*, 367 U.S. 374, 383 (1961) (emphasis added). An agency may not exceed its statutory authority or act arbitrarily in the exercise of its power. *Fidelity Fed. Savings and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153-54 (1982).

1. The TCPA expressly forecloses preemption.

Not only is there no explicit language in the TCPA stating that it preempts any state law in the field of telephone solicitations, but as the Indiana court held in *Martin & Assoc.*, *supra*, the TCPA expressly does not preempt "any state law . . . which prohibits . . . the making of telephone solicitations." 47 U.S.C. § 227(e)(1)(D). In full this statute provides as follows:

(e) Effect on State law

(1) State law not preempted

Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, **nothing in this section or in the regulations prescribed under this section shall preempt any State law** that imposes more restrictive intrastate requirements or regulations on, or **which prohibits--**

(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;

(B) the use of automatic telephone dialing systems;

(C) the use of artificial or prerecorded voice messages; or

(D) the making of telephone solicitations.

47 U.S.C. § 227 (e) (emphasis added).

Comments from the telecommunications industry have argued that this provision forecloses preemption only with respect to *intra*state regulations, not *inter*state regulations, focusing on the phrase "that imposes more restrictive intrastate requirements or regulations on . . . ." (*See, e.g.,* ATA Reply Comments at 55-56, WorldCom Reply Comments at 28-29.) However, this argument ignores the disjunctive language of the statute. As the statute is structured, express non-preemption applies to two categories of state laws: those "that impose[]more restrictive intrastate requirements . . . on" and those "which prohibit" the activities listed in sub-parts (A)-(D). The word "intrastate" modifies only the verb "imposes" which in turn refers only to "more restrictive . . . requirements or regulations on." The word "intrastate" plainly does not, however, modify the verb "prohibits." By the plain, literal meaning of the statute, state laws "which prohibit" those activities—whether interstate or intrastate—cannot be preempted.

This express non-preemption language in the TCPA should end any discussion over whether Congress intended to supersede the states' ability to apply their own DNC laws to interstate telephone calls. Section 227(e)(1) both forecloses the possibility that the TCPA itself

preempts state telephone privacy laws that prohibit interstate telephone solicitations, and forecloses the ability of the FCC to undertake such preemption on its own.

2. Other language of the TCPA implies that the TCPA does not preempt state DNC laws and demonstrates that Congress did not intend to occupy the field of telephone solicitation to the exclusion of the states.

Other language of the TCPA also shows that it does not preempt state law:

> If, pursuant to [another section of the TCPA, the Federal Communications] Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, *in its regulation of telephone solicitations*, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State.

47 U.S.C. § 227(e)(2) (emphasis added). In this provision, Congress concedes and assumes that a state or local authority may regulate telephone solicitations. If the FCC establishes a "single national database of telephone numbers of subscribers who object to receiving telephone solicitations," then a state with a law regulating telephone solicitations must import the part of the national database relating to the state into *that state's privacy list*. *Id.* (emphasis added). Congress intended that Section 227(e)(2) apply only if the FCC created a national database, but the provision makes clear that Congress contemplated that the states would regulate telephone solicitations regardless of the FCC's creation of that national database. In other words, whether or not the FCC creates that database, the TCPA does not prohibit the states from enacting laws that create lists like Indiana's telephone privacy list. Thus, the language and structure of the TCPA indicate that Congress did not preempt state telephone privacy laws by implication or by field occupation. *See Van Bergen*, 59 F.3d at 1548 (holding that the non-preemption provision of the TCPA "makes it clear that Congress did not intend to 'occupy the field' of ADAD regulation . . . .") (internal citation omitted).

The DMA mischaracterizes this portion of the TCPA when it argues that the TCPA's mandatory supplementation provision amounts to preemption. It says that 47 U.S.C. § 227(e)(1) "*also* makes the 'savings' provision it contains 'subject to paragraph 2' of subsection (e)" which in turn "provides that, if the FCC adopts a nationwide DNC registry, no state may require the use of any database that does not include the part of the national database that relates to that state." (*See* DMA comments at 5.) The DMA does not even attempt to explain how a requirement that Indiana, for example, incorporate the FCC's database of Indiana registries into Indiana's own DNC database amounts to preemption of Indiana's statute. All that means is that Indiana gets to enforce its own statute on behalf of more of its own citizens.

Other language of the TCPA also demonstrates that Congress contemplated that states could continue with their own DNC laws, notwithstanding the FCC's promulgation of a national database. As several states argued in the NAAG comments filed on December 9, 2002, the TCPA specifically states that any FCC database "*shall* . . . be designed to enable States to use the [Commission's database] . . . *for purposes of administering* or *enforcing State law*." 47 U.S.C. § 227(c)(3)(J) (emphasis added). There can be no clearer contemplation that state DNC laws would continue to be enforced unabated.

The DMA argues that the "state law" referred to in Section 227(c)(3)(J) is not state DNC law, but state laws enabling state officials and private citizens to sue under the TCPA. (*See* DMA Reply Comments at 6.) But how would the design of the FCC's database have any impact on a state's *enforcement* of a law prescribing what state official or private party may sue under the TCPA? Even if (as the DMA supposes) there are such state laws authorizing who may sue under the TCPA, if a state official or private party goes to court to enforce the TCPA without proper authority, the defendant will object that there is no basis for enforcement. It may even be

theoretically possible that another official or citizen who has authority to sue would intervene to "enforce" that state authorization law. Either way, the design of the FCC database would have no conceivable impact on the authority issue. The design of the database, however, would very likely have a considerable impact on a state official's ability to enforce a state DNC law based on calls to people registered for the FCC list, but perhaps not a state's own list. Obviously, then, the state law contemplated by Section 227 (c)(3)(J) is state DNC law, not state procedural law.

3. Expression in legislative history of unfounded fears of prior preemption, and baseless comments that an FCC list itself would preempt state laws, do not override the clear meaning of the text of the TCPA.

Comments from the telemarketing industry, and from the DMA in particular, rely on selected comments in the legislative history of the TCPA to support the notion that the TCPA preempts state DNC lists as applied to interstate calls. (*See* DMA Reply Comments at 8, Verizon Reply Comments at 6.) However, these comments either express unfounded fears of prior preemption (by statute or the dormant commerce clause—it's not clear which) or have no basis in the text of the actual statute.

First, it is important to bear in mind the limited utility of using selected comments from legislative history as a guide to statutory interpretation. "[N]either the statements of individual Members of Congress (ordinarily addressed to a virtually empty floor) nor Executive statements and letters addressed to congressional committees, nor the nonenactment of other proposed legislation, is a reliable indication of what a majority of both Houses of Congress intended when they voted for the statute before us." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 390 (2000) (Scalia, J., concurring) (internal footnote omitted).

Furthermore, a cardinal rule of using legislative history, including committee reports, floor statements, and other historical texts, when analyzing a statute is that such materials cannot

override the actual text of a statute for purposes of determining the statute's meaning. *See, e.g., Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (rejecting use of legislative history because "[w]hen the words of a statute are unambiguous . . . 'judicial inquiry is complete.'") (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981); *see also Carter v. United States*, 530 U.S. 255, 271 (2000) ("In analyzing a statute, we begin by examining the text [citation omitted], not by 'psychoanalyzing those who enacted it .'") (quoting *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 279 (1996) (Scalia, J., concurring in part and concurring in the judgment)). Yet that is exactly how the industry comments use selected floor statements concerning the TCPA—to override the plain meaning of the text of 47 U.S.C. § 227(e)(1), which expressly forecloses preemption.

With respect to the particular comments quoted by the DMA and Verizon, moreover, only two even suggest that the TCPA has any preemptive effect. The others all assume, without explanation, that some impediment to state enforcement against interstate telephone calls already exists, and that the TCPA and regulations promulgated thereunder are needed to fill the interstices. One is to the effect that the "general preemptive effect of the Communications Act of 1934" means that "State regulation of interstate communications, including domestic communications initiated for telemarketing purposes, is preempted." 137 Cong. Rec. S. 18,781, 18,784 (daily ed. Nov. 27, 1991) (remarks of Sen. Hollings). Another is also apparently based on his mistaken assumption that the Communications Act of 1934 preempted all state regulation of interstate communications; "State law does not, and cannot, regulate interstate calls. Only Congress can protect citizens from telephone calls that cross State boundaries." 137 Cong. Rec. S 16,204, 16,205 (daily ed. Nov. 7, 1991) (remarks of Sen. Hollings). The DMA also quotes the

Committee Report on S. 1462 as stating that "States do not have jurisdiction over interstate calls." Sen. Rep. No. 102-178 at 3 (1991), reprinted in 1991 U.S.C.C.A.N. 1968, 1970.

To the extent each of these comments are premised on any preemptive effect of the Communications Act of 1934, they are mistaken.[5] As explained in Part I.D., *supra*, courts have rejected the notion that state fraud and consumer protection laws cannot apply to interstate telephone calls or common carriers of telecommunications services. In other words, there is no "general preemptive effect" of the Communications Act of 1934, at least not with respect to consumer protection statutes that do not relate to the provision of telecommunication services or the prices charged for them (and DNC laws, even as applied to common telecommunications carriers, affect neither). Were it otherwise, states would be unable to penalize what is classically thought of as telephone harassment or threats made by telephone, or deceptive trade practices committed over the telephone (which are traditional areas where states exercise police power authority) when calls cross state lines. A call that originates outside Indiana but that comes into Indiana and injures an Indiana citizen is as much the business of Indiana as an injury caused by a car whose journey begins in another state but which causes injury in Indiana.

In any event, the legislative history comments that the DMA cites do not manifest any intent to use the TCPA to preempt state laws. At most, they suggest a worry that, without the TCPA, there may be some calls that fall through the cracks of state regulation. Given that (mis)understanding, federal regulation was needed not to preempt states, but to buttress

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[5] To the extent these comments are predicated on the assumption that dormant Commerce Clause doctrine precludes all state regulations that affect interstate telephone calls (*e.g.*, "States do not have jurisdiction over interstate calls"; *see also* Worldcom Reply Comments at 27, n.87), that understanding is also wrong. There is no dormant Commerce Clause doctrine holding that states absolutely may not regulate commerce—whether a telephone call or something else—that starts in one state and ends in the state that imposes the regulation. In fact, *Goldberg v. Sweet*,

enforcement. These comments reflect a desire for state and federal law to work in harmony in the event the states are otherwise preempted, not a desire for the TCPA to preempt state law. *See, e.g., Steve Martin & Assoc.*, *supra*, at 22.

The DMA cites only one comment in the legislative history of the TCPA suggesting that the TCPA itself has some preemptive impact. (*See* DMA Reply Comments at 8.) This comment suggests that, if the FCC were to promulgate a national database, that would "preempt the states from adopting a database approach." 137 Cong. Rec. H. 11,307, 11,311 (daily ed. Nov. 26, 1991) (remarks of Rep. Rinaldo). But this comment is flat wrong by any reasonable understanding of the TCPA. In addition to ignoring the express statutory language that precludes preemption, the comment ignores how the TCPA, rather than requiring states to scrap their own databases, merely requires states to incorporate any national database into state databases. 47 U.S.C. § 227(e)(2) (providing that a state may not use a database "that does not include the part of such single national database that relates to such state"). Thus, as explained in Part II.B.2, *supra*, the TCPA clearly contemplates that the federal database (*i.e.*, the "single national" database)[6] would supplement, not supplant, state databases. Indeed, were this comment correct, that would mean the FCC's database would preempt *all* applications of state databases, not just their application to interstate calls.

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488 U.S. 252 (1989), expressly upheld against a Commerce Clause challenge a state tax that applied to interstate telephone calls.

[6] Many comments from the telecommunications industry suggest that the term "single national database" means that there can be only one database in play across the entire country. But if that were so, then the text of this provision that merely requires states to "include" the FCC database related to that state would make no sense. Further, if that had been Congress' intent, Congress would have included a comma between single and national to show that single and national were independent modifiers. As written, however, "single" merely modifies "national," but not "database." Thus, while there may be only one "national" database (*i.e.,* only one database from the FCC), that does not preclude multiple databases from the states.

Verizon cites a vague comment from a Committee Report justifying some aspects of the TCPA "because state laws will be preempted." (*See* Verizon Reply Comments at 6, quoting H.R. Rep. 102-317, 102nd Cong., 1st Sess., at 21 (1991)). However, it is not clear whether this mistaken assertion was premised on a misunderstanding of the FCA or a belief about the impact of the TCPA. The report simply does not explain in what way the state law would be preempted, and whether that preemption simply has to do with the lists that states use (*see* 47 U.S.C. § (e)(2)) or the substantive law that states enforce. But either way, it is contrary to, and cannot override, the actual text of the TCPA.

The bottom line is that the selected comments legislative history do not—and cannot—provide any basis for inferring either outright preemption by the TCPA or conferral on the FCC of the power to preempt state laws. The text of the statute controls, and even where that is not clear, legislative history must not be used for guidance where, "[a]s is often the case, the legislative history, even if it is relevant, supports conflicting inferences and provides scant illumination." *Carter*, 530 U.S. at 271 n.9. States can and do enforce their DNC laws against interstate telemarketers, and no federal statute prevents them from doing so or authorizes the FCC to prevent them from doing so.

4. The Do-Not-Call Implementation Act confirms that there is and shall be no preemption of state DNC law.

The Do-Not-Call Implementation Act, PL 108-10 (HR 395) ("DNCIA), which became effective March 11, 2003, confirms both that the TCPA does not preempt state DNC laws and that the FCC is not empowered to preempt those laws. The DNCIA specifically requires the FCC, once it promulgates its own DNC rules, to provide Congress with "an analysis of the progress of coordinating the operation and enforcement of the 'do-not-call' registry with similar registries established and maintained by the various States." If the TCPA preempted state

registries or DNC laws, or if Congress believed that the FCC was to preempt those laws and registries, there would be no reason for Congress to have *enacted a law* requiring an analysis of state registry enforcement *after* the FCC's own rule was in force. Nor should this law be surprising: It is fully consistent with the language of the TCPA, especially its express savings provision. The DNCIA thus completely ends this debate.

Conclusion

For the foregoing reasons, in establishing a national DNC rule and registry, the Commission should expressly declare that its rule and registry do not preempt any similar state laws or registries.

Respectfully submitted,

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